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Supreme Court of the United States

October Term, 1944.

No. 460

HOWARD L. KERFOOT, as Administrator of the Goods, Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

Petitioner,

AGAINST

ROBERT H. KELLEY,

Defendant,

AND

RUTH KELLEY,

Respondent.

Petition and Brief in Support for Writ of Certiorari.

JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.

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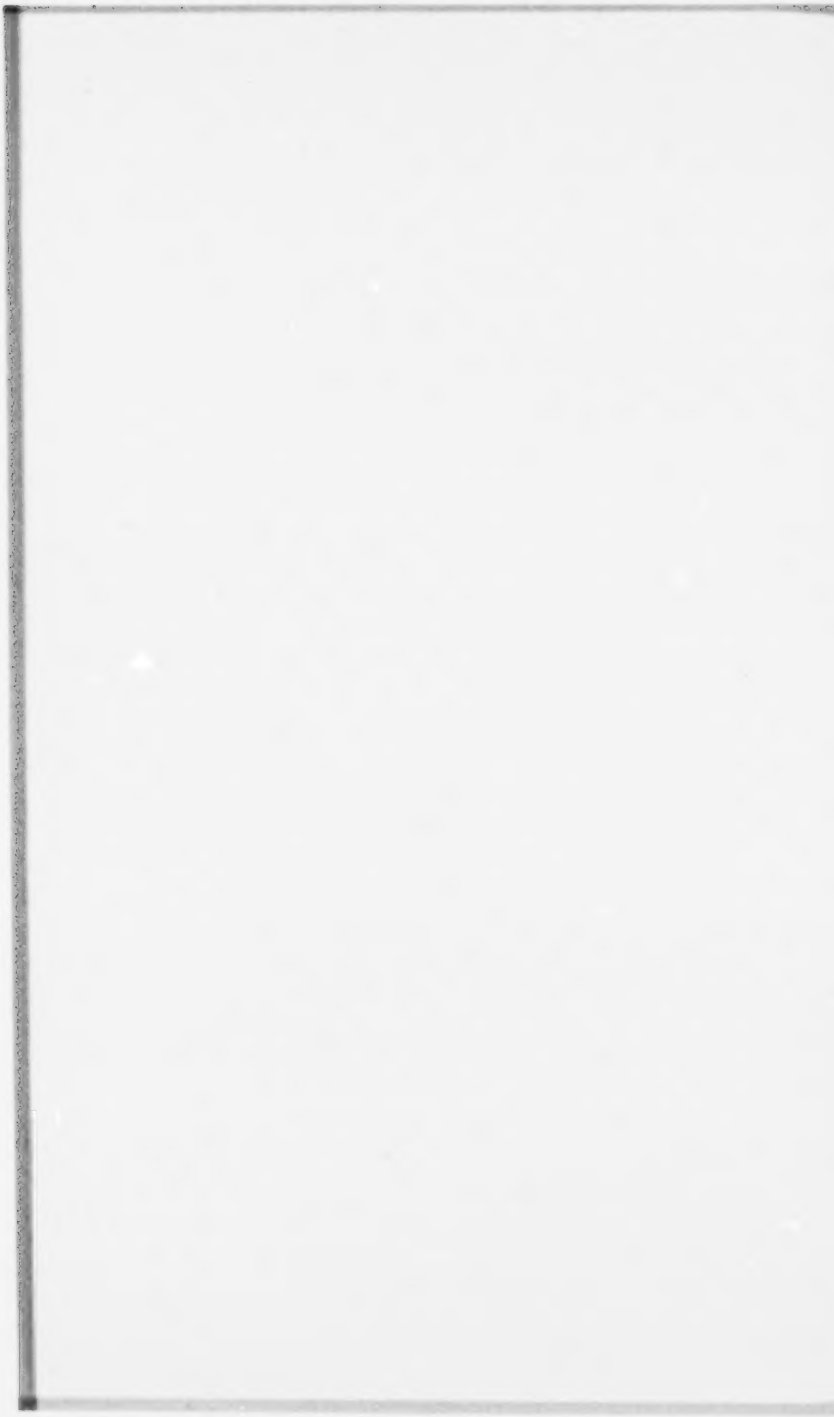

INDEX.

PAGE

PETITION:

Summary Statement of the Matter Involved 1

The Facts 2

The Questions of Law 2

Reasons for Allowance of the Writ 3

BRIEF:

I.—Opinion of the Court Below 4

II.—Statement of Jurisdiction 4

III.—Statement of the Case 5

IV.—Assignment of Errors 5

Summary of Argument 5

POINT I.—The Court erred in substituting its judgment on the facts for that of the jury.. 6

POINT II.—There was ample evidence to sustain the jury's findings 8

POINT III.—The decisions relied on by the lower Court do not rule this case 13

CONCLUSION 14

Cases Cited.

	PAGE
Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521	7
Boggs v. Plybon, 157 Va. 30	14
Carroll v. Miller, 175 Va. 388	13, 14
Collins v. Robinson, 160 Va. 520	13
Goldstein v. Pullman, 220 N. Y. 549	7
Hackley v. Robey, 170 Va. 55	13
Howard v. Louisiana & A. Ry. Co., 49 Fed. (2d) 571	7
Johnson v. Dierks Lumber & Coal Co., 130 Fed. (2d) 115	7
Judy v. Doyle, 130 Va. 392	11
Margiotta v. Aycock, 162 Va. 557	9, 13
Massalitti v. Fitzroy, 228 Mass. 487	13
McNally v. Oakwood, 210 App. Div. 612, aff'd 240 N. Y. 600	7
Parsons v. Bedford, 3 Pet. 433, 1830, 28 U. S. 433	6
Poole v. Kelley, 162 Va. 279	8, 10, 12
Slocum v. N. Y. Life Insurance Co., 228 U. S. 364	6
Stubbs v. Parker, 169 Va. 676	13
Tantillo v. Goldstein Bros. Amusement Co., 248 N. Y. 286	7
Thornhill v. Thornhill, 172 Va. 553	13
Walker v. New Mexico &c. Railroad Co., 165 U. S. 593	6
Watson v. Coles, 170 Va. 141	13
Worcester v. McClurkin, 174 Va. 221	13
Yorke v. Cottle, 173 Va. 372	13
Young v. Dyer, 161 Va. 434	13, 14

AUTHORITY CITED.

Section 240 (a) Judicial Code as Amended by Act of Congress, Feb. 13, 1925 (U. S. C., Title 28, Section 347)	5

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OCTOBER TERM, 1944.

No. .....

HOWARD L. KERFOOT, as Administrator of the Goods Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

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AGAINST

ROBERT H. KELLEY,

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AND

RUTH KELLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the Court of Appeals of the State of New York in the above case.

Summary Statement of the Matter Involved.

This petition seeks to review a judgment of the Court of Appeals of the State of New York reversing the judgment of the Appellate Division of the Supreme Court in the First Judicial Department, which affirmed by a four to one decision a judgment of the Supreme Court in fa-

vor of the petitioner entered in Bronx County upon a verdict rendered by a jury in Trial Term (Hammer, *J.*), which verdict was predicated upon a factual issue in a negligence action.

The action was based on gross negligence.

The answer was a general denial, the Virginia Statute of Limitation, limitation of liability and contributory negligence.

The Facts.

Madeline Meredith Kerfoot, 32 years of age (fol. 107), petitioner's intestate, suffered injuries on the 6th day of May, 1939 (fol. 127) which resulted in her death on the 9th day of May, 1939 (fol. 120), leaving her surviving her husband, Howard L. Kerfoot, 34 years of age (fol. 107) and two infant children, Melvin Randolph, who was 10 years of age and Kathleen Anita, who was 8 years of age at the time of decedent's death (fols. 107-108).

The accident occurred at approximately 6:00 P. M., at Fishburne Park, Roanoke, Virginia, while the decedent was riding as a guest in an automobile driven by the respondent, Ruth Kelley (fols. 117-118, 187).

The accident was described by an eye witness, Elton Rardin, who at the time of the accident was a surveyor for the Norfolk and Western Railroad (R., p. 10), by deposition, as his personal attendance at the trial could not be arranged because Mr. Rardin was with the Armed Forces of the United States Government at the time of the trial.

The Questions of Law.

1. The jury in Trial Term before Judge Ernest E. L. Hammer, decided the case in favor of the petitioner and the said Trial Court denied the motion on behalf of respondent to set the verdict aside (R., p. 39).

The Appellate Division affirmed the judgment by a four to one decision, Martin, Dore, Cohn and Callahan, *J.J.* voting for affirmance and Untermyer, *J.*, dissenting without opinion.

The Court of Appeals of the State of New York unanimously reversed and dismissed the complaint which in effect was substituting a trial by the court in place of a trial by jury, in direct conflict with the laws of the State of Virginia and in violation of the seventh amendment to the Constitution of the United States of America.

Reasons for Allowance of the Writ.

The Court of Appeals of the State of New York has decided a question of law of widespread importance to every citizen of the United States denying to a litigant the right to a jury trial, in direct violation of the seventh amendment to the constitution of the United States of America.

The Court of Appeals of the State of New York has taken on to itself the prerogative of substituting its judgment in place of that of a jury on a question of fact which is probably untenable and in conflict with all authority not only of this Court but of every Court of the United States of America.

The decision of the lower court is an encroachment on the rights of a litigant to a trial by jury and in conflict with the decision of this Court in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

Dated, September 21, 1945.

HOWARD L. KERFOOT,

By: JACOB RASSNER,
Counsel for Petitioner.